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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 JESUS MARTINEZ,

12 Plaintiff,

13 vs.

14 CACH, LLC et al.,

15 Defendants.

CASE NO. 10CV1625 DMS (JMA)

**ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANT CACH, LLC'S
MOTION TO DISMISS THE
FIRST AMENDED COMPLAINT**

16
17 Pending before the Court is Defendant CACH, LLC's motion to dismiss the First Amended
18 Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. 31.)
19 For the following reasons, the Rule 12(b)(1) motion is denied and the Rule 12(b)(6) motion is denied
20 in part and granted in part.

21 **I.**

22 **BACKGROUND**

23 Plaintiff is alleged to have incurred debt to Bank of America, N.A. sometime prior to
24 December 2009. (FAC ¶ 18, Ex. B.) The debt was subsequently assigned or transferred to CACH for
25 collection. (*Id.* at ¶ 21.) On December 8, 2009, CACH filed a Complaint against Plaintiff in San
26 Diego Superior Court in an effort to collect the outstanding debt. (*Id.* at ¶ 22, Ex. A.) In that
27 Complaint, CACH claimed a right to 24.50 percent annual fixed interest rate on the alleged debt. (*Id.*
28 at ¶ 24, Ex. A.) Plaintiff alleges CACH violated the Fair Debt Collection Practices Act ("FDCPA")

1 and the Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”) when, as a custom and
 2 practice, it sued him and other similarly situated individuals for excessive interest rates it did not have
 3 a legal right to collect under statute or contract.

4 Plaintiff filed a Complaint against CACH on August 4, 2010. (Doc. 1.) The Court
 5 subsequently granted Plaintiff’s motion for leave to file the FAC, which Plaintiff filed on April 4,
 6 2011. (Docs. 28-29.) The FAC states five claims for relief on behalf of a putative class of individuals:
 7 (1) violations of the FDCPA, (2) violations of the Rosenthal Act, (3) actual fraudulent transfer, (4)
 8 constructive fraudulent transfer, and (5) alter ego. (Doc. 29.) On April 25, 2011, Defendant CACH
 9 filed the instant motion to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(1) and
 10 12(b)(6). (Doc. 31.) Plaintiff filed an opposition and Defendant filed a reply. (Docs. 33-34.)

11 II.

12 DISCUSSION

13 A. 12(b)(1) Motion to Dismiss

14 A defendant may move to dismiss an action under Rule 12(b)(1) if the Court lacks subject
 15 matter jurisdiction over the action. On a motion to dismiss pursuant to Rule 12(b)(1), the Court “is
 16 not restricted to the face of the pleadings, but may review any evidence, such as affidavits and
 17 testimony, to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. United*
 18 *States*, 850 F.2d 558, 560 (9th Cir. 1988). Defendant moves to dismiss the action for lack of subject
 19 matter jurisdiction on two bases: (1) that the instant action was rendered moot by Defendant’s
 20 unaccepted offer of judgment and (2) the *Rooker-Feldman* doctrine.

21 1. Offer of Judgment

22 In a class action against a debt collector for violation of the FDCPA, each named plaintiff is
 23 entitled to actual damages and additional damages in an amount of up to \$1,000.00, as the court may
 24 allow. 15 U.S.C. § 1692k(a)(2)(A), (B). The court may award damages “for all other class members,
 25 without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum
 26 of the net worth of the debt collector.” *Id.* at § 1692k(a)(2)(B). The Rosenthal Act, as amended,
 27 expressly incorporates the remedies permitted under the FDCPA into its provisions and courts have
 28 found this includes the class action mechanism permitted under the FDCPA. Cal. Civ. Code §

1 1788.17; *see also, e.g., Gonzales v. Arrow Fin. Servs., LLC*, 233 F.R.D. 577, 580-81 (S.D. Cal. 2006);
 2 *McDonald v. Bonded Collectors, L.L.C.*, 233 F.R.D. 576, 577 (S.D. Cal. 2005); *Palmer v. Stassinios*,
 3 233 F.R.D. 546, 547-48 (N.D. Cal. 2006). Defendant argues, however, that if the Rosenthal Act is
 4 deemed to have incorporated the class action mechanism set forth in the FDCPA, then it should also
 5 be deemed to have incorporated the limitations on damages recoverable by the class set forth in §
 6 1692k(a)(2)(B) of the FDCPA. The Court agrees and so assumes for purposes of this motion.

7 Rule 68 provides that a defendant “may serve on [a plaintiff] an offer to allow judgment on
 8 specified terms, with the costs then accrued.” Fed. R. Civ. P. 68(a). If accepted, the judgment is
 9 entered against the defendant. If rejected, the offer is deemed withdrawn. Importantly, if the judgment
 10 the plaintiff ultimately obtains “is not more favorable” than the defendant’s offer, the plaintiff “must
 11 pay the costs incurred after the offer was made.” Fed. R. Civ. P. 68(d). On January 21, 2011, CACH
 12 made an offer that would allow judgment to be taken against it in favor of Plaintiff in the amount of
 13 \$2,100.00 and in favor of the putative class in the amount of \$500.00, both together with reasonable
 14 fees and costs. (Johnson Decl. Ex. 1.) With the FDCPA’s damages limitations in mind, CACH argues
 15 this Court lacks subject matter jurisdiction over this action because CACH’s offer of judgment offered
 16 Plaintiff and the putative class all the relief they could possibly obtain in this action and was not
 17 accepted. According to CACH, the offer of \$2,100.00 to Plaintiff exceeds the statutory damages he
 18 is individually entitled to under the FDCPA and the Rosenthal Act, and the offer of \$500.00 to the
 19 putative class exceeds one percent of CACH’s net worth, which it asserts is presently negative. CACH
 20 claims Plaintiff’s failure to accept the offer renders this action moot and deprives this Court of Article
 21 III jurisdiction over the action due to the lack of a present case or controversy. Article III of the
 22 Constitution prohibits federal courts from hearing cases which are not based on “actual, ongoing cases
 23 or controversies.” *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010)(quotation omitted). The
 24 party asserting mootness bears the burden of showing that there is no effective relief remaining for the
 25 court to provide. *GATX/Airlog Co. v. U.S. Dist. Court for N. Dist. of Cal.*, 192 F.3d 1304, 1306 (9th
 26 Cir. 1999).

27 As CACH acknowledges, courts have often been hesitant to permit a defendant to render a
 28 putative class action moot by making an offer of judgment to the named plaintiff only, whether before

1 or after the filing of a motion to certify the class. *See, e.g., Deposit Guaranty Nat'l Bank v. Roper*, 445
 2 U.S. 326, 339 (1980); *Weiss v. Regal Collections, Inc.*, 385 F.3d 337, 347-49 (3d Cir. 2004). CACH
 3 argues, however, that because it made an offer of judgment to the putative class in addition to the
 4 named Plaintiff, the present case is distinguishable from these cases. Although CACH did make an
 5 offer of judgment to the putative class in the amount of \$500.00, the Court does not find the offer
 6 rendered the instant action moot. Where the amount of damages the putative class may eventually be
 7 entitled to is dependent upon the net worth of the defendant, it would be inequitable to permit a
 8 defendant to render an action in which the plaintiff alleges the defendant made fraudulent transfers of
 9 assets to an alter ego in order to falsify its net worth moot by making an offer of judgment to the class
 10 based upon defendant's representation of its allegedly falsified net worth. Accordingly, the claims
 11 stated by Plaintiff on behalf of himself and the putative class here are not rendered moot merely
 12 because Plaintiff did not accept the minimal offer of judgment made to the putative class by CACH.

13 **2. Rooker-Feldman Doctrine**

14 CACH further argues the instant action is an attempt to challenge the validity of an underlying
 15 state court judgment in violation of the *Rooker-Feldman* doctrine. *See Rooker v. Fid. Trust Co.*, 263
 16 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The *Rooker-Feldman*
 17 doctrine is intended to prevent federal district courts from hearing "cases brought by state-court losers
 18 complaining of injuries caused by state-court judgments rendered before the district court proceedings
 19 commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp.*
 20 *v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). "A suit brought in federal district court is a
 21 'de facto appeal' forbidden by *Rooker-Feldman* when 'a federal plaintiff asserts as a legal wrong an
 22 allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that
 23 decision.' In contrast, if a plaintiff 'asserts as a legal wrong an allegedly illegal act or omission by an
 24 adverse party, *Rooker-Feldman* does not bar jurisdiction.'" *Carmona v. Carmona*, 603 F.3d 1041,
 25 1050 (9th Cir. 2010)(citations omitted).

26 CACH argues the class that Plaintiff seeks to represent includes consumers against whom
 27 CACH has secured final state court judgments and that Plaintiff seeks to challenge the legitimacy of
 28 the underlying state court judgments and to recover damages based upon alleged injuries resulting from

1 those judgments. CACH asserts these claims are barred by the *Rooker-Feldman* doctrine and the Court
2 therefore lacks subject matter jurisdiction to consider them. Plaintiff argues the *Rooker-Feldman*
3 doctrine does not apply here because Plaintiff and the class are not challenging the entry of judgments
4 by the state court, but are rather asserting violations of rights that arise from misrepresentations
5 regarding the amount of interest CACH had a right to collect made by CACH in filing the state court
6 complaints. Plaintiff further points out no judgment exists against him and no mention of state court
7 judgments is made in the FAC.

8 The Court agrees with Plaintiff that the *Rooker-Feldman* doctrine does not deprive it of subject
9 matter jurisdiction over the entire action at this stage in the proceedings. Plaintiff is not seeking a *de*
10 *facto* appeal of the state court judgments obtained by CACH against certain members of the putative
11 class. Rather, Plaintiff claims CACH became liable under the FDCPA and the Rosenthal Act
12 immediately upon filing of the state court complaints against Plaintiff and the putative class members
13 and that any judgments obtained by CACH against members of the putative class will remain
14 undisturbed by this action. Plaintiff's claims in the present action are therefore not inextricably
15 intertwined with any potential underlying state court judgments of putative class members. *See*
16 *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008) ("A federal action constitutes such
17 a de facto appeal where claims raised in the federal court action are inextricably intertwined with the
18 state court's decision such that the adjudication of the federal claims would undercut the state ruling
19 or require the district court to interpret the application of state laws or procedural rules." (citation and
20 quotations omitted)). Furthermore, CACH claims Plaintiff is asking "this Court to question the
21 validity of state court judgments to the extent that those judgments are purportedly based on an
22 improper interest rate," but fails to identify or provide any information as to any such judgment entered
23 against Plaintiff or any member of the putative class. (Reply at 7.) Accordingly, this Court is not
24 prevented from exercising subject matter jurisdiction over this action under the *Rooker-Feldman*
25 doctrine. For the foregoing reasons, Defendant's motion to dismiss the FAC pursuant to Rule 12(b)(1)
26 is denied in its entirety.

27 **B. 12(b)(6) Motion to Dismiss**

28 In the FAC, Plaintiff alleges CACH fraudulently transferred assets to its alter ego, SquareTwo

1 Financial Commercial Funding Corporation (“SquareTwo”), for the purpose of making its net worth
 2 zero in order to avoid liability for damages in the present action and other similar actions. In the
 3 alternative to its motion to dismiss pursuant to Rule 12(b)(1), CACH moves to dismiss Plaintiff’s
 4 claims for actual fraudulent transfer, constructive fraudulent transfer, and alter ego pursuant to Rule
 5 12(b)(6). A party may move to dismiss a claim under Rule 12(b)(6) if the claimant fails to state a
 6 claim upon which relief can be granted. The Federal Rules require a pleading to include a “short and
 7 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The
 8 Supreme Court, however, recently established a more stringent standard of review for pleadings in the
 9 context of 12(b)(6) motions to dismiss. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp.*
 10 *v. Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under this new standard, “a
 11 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
 12 plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). “A claim has
 13 facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 14 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at
 15 556). “Determining whether a complaint states a plausible claim for relief will . . . be a context-
 16 specific task that requires the reviewing court to draw on its judicial experience and common sense.”
 17 *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). The reviewing court must
 18 therefore “identify the allegations in the complaint that are not entitled to the assumption of truth” and
 19 evaluate “the factual allegations in [the] complaint to determine if they plausibly suggest an
 20 entitlement to relief.” *Id.* at 1951.

21 **1. Actual Fraudulent Transfer**

22 To state a claim for actual fraudulent transfer, a plaintiff must allege a debtor defendant made
 23 a transfer or incurred an obligation “with actual intent to hinder, delay, or defraud any creditor of the
 24 debtor.” Cal. Civ. Code § 3439.04(a)(1). Because a claim for actual fraudulent transfer involves an
 25 allegation of fraud or mistake, it is subject to Federal Rule of Civil Procedure 9(b), which requires a
 26 party to “state with particularity the circumstances constituting fraud or mistake” and is applied by a
 27 federal court to both federal law and state law claims. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
 28 1102-03 (9th Cir. 2003). A pleading will be “sufficient under Rule 9(b) if it identifies the

1 circumstances of the alleged fraud so that the defendant can prepare an adequate answer.” *Fecht v.*
 2 *Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995)(quotation omitted). The same is true for allegations of
 3 fraudulent conduct. *Vess*, 317 F.3d at 1103-04. In other words, fraud allegations must be
 4 accompanied by “the who, what, when, where, and how” of the misconduct charged. *Id.* at 1106
 5 (quotation omitted).

6 In the FAC, Plaintiff alleges CACH transferred assets to SquareTwo. (FAC ¶¶ 55 (“Defendant
 7 SQUARETWO caused Defendant CACH to transfer assets from CACH to SQUARETWO . . .”), 56
 8 (“CACH transferred, and continues to transfer, all assets to its parent SQUARETWO.”), 60-61.)
 9 Plaintiff also alleges the transfer was “intended to hinder, delay or defraud Plaintiff and the members
 10 of the proposed classes in this action,” and “Defendants attempted to conceal or remove assets from
 11 CACH’s ledgers so that is could be ‘judgment proof’ or otherwise not liable for damages and other
 12 relief in an action such as the instant action by Plaintiff.” (*Id.* at ¶ 56.) However, despite reciting the
 13 elements of a claim for actual fraudulent transfer, the allegations in the FAC do not include sufficient
 14 factual detail to state a plausible claim for relief, nor do they satisfy the heightened pleading
 15 requirements of Rule 9(b). Plaintiff does not identify any specific alleged transfers of assets or include
 16 allegations regarding the amounts, mechanisms, or timing of any such transfers. In support of his
 17 motion for leave to file a FAC, Plaintiff submitted financial documents presented to the Illinois
 18 Secretary of State and the North Carolina Department of Insurance.¹ (Doc. 21.) According to Plaintiff,
 19 these documents evidence a transfer of assets by CACH to SquareTwo. However, the allegations
 20 contained in the FAC itself lack sufficient factual detail to survive a motion to dismiss and Defendant’s
 21 motion to dismiss this claim under Rule 12(b)(6) is granted.

22 **2. Constructive Fraudulent Transfer**

23 Claims for constructive fraudulent transfer may be stated under either or both California Civil
 24 Code § 3439.04(a)(2) or § 3439.05. Section 3439.04(a)(2) provides that a transfer is fraudulent if the
 25 debtor made the transfer or incurred the obligation without receiving “a reasonably equivalent value
 26

27 ¹ CACH requests the Court to take judicial notice of Plaintiff’s motion for leave to file
 28 a FAC. (Doc. 21.) Because Plaintiff’s motion is a publicly filed document and is capable of ready and
 accurate determination, the Court may take judicial notice of it pursuant to Federal Rule of Evidence
 201. Accordingly, Defendant’s request is granted.

1 in exchange” and either:

2 (A) Was engaged or was about to engage in a business or a transaction for which the
 3 remaining assets of the debtor were unreasonably small in relation to the business or
 4 transaction . . . [or] (B) Intended to incur, or believed or reasonably should have
 believed that he or she would incur, debts beyond his or her ability to pay as they
 became due.

5 Section 3439.05 states:

6 A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor
 7 whose claim arose before the transfer was made or the obligation was incurred if the
 debtor made the transfer or incurred the obligation without receiving a reasonably
 8 equivalent value in exchange for the transfer or obligation and the debtor was insolvent
 at that time or the debtor became insolvent as a result of the transfer or obligation.

9 A claim of constructive fraudulent transfer is not subject to the heightened pleading requirements of
 10 Rule 9(b). However, a plaintiff must still state a claim for relief that is plausible on its face. Here,
 11 Plaintiff has failed to include sufficient factual detail in the FAC to state a claim for relief for
 12 constructive fraudulent transfer that is plausible on its face.

13 In addition to the allegations stated in support of Plaintiff’s claim for actual fraudulent transfer,
 14 Plaintiff alleges “CACH does not receive reasonably equivalent value of assets transferred to parent
 15 SQUARETWO for the liabilities CACH has incurred in exchange for such transfer of assets.” (FAC
 16 at ¶ 61.) However, as stated above, the FAC includes no additional factual allegations regarding any
 17 transfers of assets or whether CACH received any value in exchange for any such transfers, let alone
 18 a reasonably equivalent value. Accordingly, Defendant’s Rule 12(b)(6) motion to dismiss this claim
 19 is granted.

20 **2. Alter Ego**

21 CACH also argues Plaintiff has not sufficiently pled a claim that SquareTwo is the alter ego
 22 of CACH and an alter ego relationship is not created merely because a parent corporation contributes
 23 funds to a subsidiary, which is what CACH asserts occurred here. In the FAC, Plaintiff alleges the
 24 relationship between CACH and SquareTwo “results in CACH being nothing more than an instrument
 25 and/or conduit of SQUARETWO in the pursuit of the single business venture and/or enterprise of debt
 26 collection.” (*Id.* at ¶ 63.) Plaintiff further alleges the companies “share common directors, officers,
 27 and employees; and jointly benefit from transactions entered into by one[another],” and that
 28 SquareTwo possesses “control over defendant CACH’s finances, policies, and business practices.”

(*Id.* at ¶¶ 64-65.)

In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers.

Sonora Diamond Corp. v. Superior Court of Tuolumne Cnty., 83 Cal. App. 4th 523, 538-39 (2000)(citations and quotations omitted). Here, Plaintiff's allegations of an alter ego relationship between CACH and SquareTwo are sufficient to state a plausible claim and to survive a Rule 12(b)(6) motion to dismiss. CACH's motion to dismiss this claims pursuant to Rule 12(b)(6) is denied.

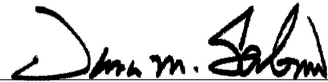
III.

CONCLUSION

For the foregoing reasons, Defendant's Rule 12(b)(1) motion to dismiss is denied and its Rule 12(b)(6) motion to dismiss is denied in part and granted in part. Plaintiff requests leave to file an amended Complaint to rectify any deficiencies in the FAC found by the Court. The Court grants Plaintiff leave to file an amended Complaint consistent with this Order on or before July 8, 2011. Should Plaintiff feel it is necessary to file any portion of the amended Complaint under seal pursuant to the Protective Order in place in this action, he may move for leave of the Court to file under seal and the Court will determine the propriety of such motion at that time.

IT IS SO ORDERED.

DATED: June 27, 2011



HON. DANA M. SABRAW
United States District Judge